BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAUL D. MILLER	)	
Claimant	)	
	)	
VS.	)	
	)	
FIBERCARE, INC.	)	
Respondent	)	Docket No. 1,011,875
	)	
AND	)	
	)	
CONTINENTAL WESTERN INS. CO.	)	
Insurance Carrier	)	

ORDER

Claimant and respondent and its insurance carrier requested review of the March 13, 2006, Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on June 6, 2006.

APPEARANCES

Brian D. Pistotnik, of Wichita, Kansas, appeared for claimant. Nathan D. Burghart, of Lawrence, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The March 16, 2005, letter from claimant's counsel to respondent's counsel that was attached to claimant's brief to the Board was not part of the record considered by the ALJ and, therefore, is not part of the record on appeal.[1]

ISSUES

The ALJ found that claimant is entitled to a 15 percent permanent partial disability based on a split of the functional impairment ratings of Dr. James Gluck and Dr. Pedro Murati. The ALJ also concluded that claimant voluntarily terminated his accommodated employment with respondent and is not entitled to work disability. The ALJ also found that

[1] K.S.A. 44-555c(a).

the travel reimbursement paid to claimant by respondent was an economic benefit to claimant and should be included as part of his wages in calculating his preinjury gross average weekly wage.

Claimant argues that respondent did not make a good faith effort to accommodate his restrictions and, therefore, he is entitled to a work disability based on a 100 percent wage loss. In the alternative, claimant requests that the Board impute a post-injury wage at the minimum wage claimant was offered by respondent, which would give claimant a 62 percent wage loss.

Respondent and its insurance carrier (respondent) agree with the ALJ's finding that claimant is not entitled to a work disability because he voluntarily quit his job. Respondent asserts, however, that the ALJ erred in including the travel reimbursement paid by respondent to claimant in the average weekly wage. Respondent also contends that if the ALJ's average weekly wage determination is modified and the compensation rate is reduced, it is entitled to a credit for overpayment of temporary total disability (TTD) compensation. Should a work disability be considered, respondent argues that there is no credible task list and, therefore, no credible task loss opinion Furthermore, there is no task loss because the authorized treating physician, Dr. Gluck, did not impose permanent work restrictions. Finally, respondent argues that claimant's injuries should be compensable as two separate scheduled injuries rather than a body as a whole injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Respondent contracts with hotels to provide cleaning services. Employees work in crews of two or three and are sent out for three months at a time traveling to hotels. Claimant first began working for respondent on January 8, 2003. He worked 6 to 7 days a week and from 50 to 67 hours a week. His position required him to travel all over the country. He was paid $7 per hour for maintaining the vehicle and equipment and for cleaning the public areas of the hotel: the hallways, public restrooms, sitting areas, and dining areas. He was paid piecework for the cleaning he did in individual hotel rooms, being paid at different rates depending on whether he cleaned the air conditioning unit, carpets, drapes, or furniture. He was paid $50 for every 500 miles he traveled.

Claimant was also given a travel reimbursement, or per diem, of either $20 or $25 per day unless he was working in the Wichita area. He stated that he was paid $20 per day if the hotel room he stayed in was furnished with a kitchenette. If the room did not have cooking facilities, he was paid $25 per day. Taxes were not deducted from this travel reimbursement. Claimant was paid from $80 to $175 per week travel reimbursement,

which he considered an economic benefit because it did not cost him that much to purchase food for himself.

In cleaning the air conditioning and heater units, claimant would use a wand similar to that found in a car wash but with more pressure coming out of it. He would pull a trigger with a lot of force, and the wand vibrated. He would be using this wand, pulling on the trigger, from 8 to 11 hours a day.

After working about six or seven days on the job, claimant started noticing some discomfort in his hands, but he thought he just needed to get broken into the job. His symptoms gradually worsened, and he noticed the symptoms came when he would squeeze the trigger on the wand. He would alternate hands squeezing the trigger but is right-hand dominant and used his right hand most of the time.

After claimant began noticing these symptoms, he reported them to Terri Erker, respondent's general manager in Wichita. Claimant's first medical treatment was with Dr. Fromm. He did not remember if respondent sent him to Dr. Fromm or if he went on his own. When he saw Dr. Fromm, he was having problems with both arms, but the right was worse. Dr. Fromm gave him some medicine and asked him to return in two weeks. However, claimant was afraid of losing his job so he let on that his discomfort was not as bad as it was and went back to work.

Claimant had a motor vehicle accident on February 15, 2003, in Wyoming, while he was driving a company vehicle. He was not injured in that accident, but because he had been drinking, he was terminated by respondent. He was subsequently rehired on the condition that he not do any driving. He returned to work approximately May 25, 2003. About June 18 or 19, he started noticing his symptoms were worsening, but he was able to work until June 25. By June 25, 2003, the symptoms had gotten so bad he could not even hold a cup of coffee. He reported the problems to Ms. Erker, who sent him a ticket to return to Wichita. The testimony supports the ALJ's determination of a general body disability due to the simultaneous aggravation of claimant's bilateral upper extremities.

When claimant got home, he saw his own doctor, Dr. Schneider. Respondent paid for medication prescribed by Dr. Schneider. Dr. Schneider told him he needed to see a specialist, and eventually Dr. Gluck became his treating physician. After four surgeries, claimant was released from treatment in February 2005.

After claimant was released from treatment, he contacted respondent about returning to work. He provided respondent with a copy of his restrictions but did not discuss with respondent what his wage would be.

On March 14, 2005, claimant returned to work. When he arrived, DaNey McLean gave him a five-gallon bucket and a dolly. He was sent to a concrete sidewalk and was told to remove rocks from a dried up flower bed. He began putting the rocks in the bucket.

After about 20 to 25 minutes, his hands started bothering him and he started wondering how much he was earning picking up rocks. He went back and asked Ms. McLean, and she told him he was making minimum wage. He told her he was not going to do that work for minimum wage. Ms. McLean asked him to sign a piece of paper to that effect, which he did. He then left. Claimant testified that before he signed the paper on March 14, 2005, he told Ms. McLean that the work he was doing was bothering his hands. Claimant said picking up the rocks was outside the restrictions given him by Dr. Gluck.

After claimant left his employment, his attorney sent respondent a letter asking that claimant be returned to a job which did not violate his restrictions. Claimant received no response to this request. Respondent never made claimant another job offer or made any attempt at further accommodation.

After he left work at respondent, claimant started looking for work elsewhere. He would drive around and pick up applications, fill them out, and drop them back off. He used the telephone book and the newspaper to locate potential employers. He has also signed up with the Kansas Work Force. He submitted a long list of potential employers he contacted about work. He tried to work at Sparkle Cleaning from June 1 to June 13 earning $6.50 per hour. However his hands could not tolerate the type of work he was hired to do. Claimant filed a workers compensation claim against that employer for an aggravation of his condition. He went to see Dr. Gluck, who told him he should not be working that many hours or days in a row. In April 2005, claimant worked part time for a cleaning service. He only worked from three to five hours a week and could not remember the name of the cleaning company. He worked at this business for about three weeks.

Terri Erker testified and confirmed claimant's testimony that when employees travel for respondent, they are not paid for the actual time they are traveling. If an employee travels, he is paid $50 per every 500 miles if traveling in a company vehicle. Employees are paid a travel reimbursement of $20 or $25 per day. If the hotel room that employees stay in is equipped with a kitchen, he or she is paid $20 per day. If they stay at a hotel that does not have a refrigerator or microwave in the room, they get $25 per day. There are no fringe benefits. Employees are provided with four shirts and two pair of pants and are responsible for maintaining the clothing.

Employees do not submit receipts for their meals but are expected to pay for these expenses from their travel reimbursement. Ms. Erker said respondent does not consider travel reimbursement to be part of their employees' salaries. If an employee spends less than the $20 or $25 per diem, he is allowed to keep the difference. Employees are given rooms free of charge at the hotels they clean. They also get free breakfasts when staying at hotels that offer that to their guests. That does not take away from their $20 or $25 travel reimbursement per day.

Claimant argues his gross average weekly wage while working for respondent was $540.36.[2] Respondent argues that the travel payments should not be included in the average weekly wage and that the correct average weekly wage is $331.70.[3] The issue raised by the respondent for the Board's review centers on whether the $20 or $25 per diem constituted an economic benefit to claimant when he was traveling and performing work for respondent outside of Wichita.[4] Claimant makes no request for the value of the hotel lodging and free meals provided at the hotels to be included in his average weekly wage.[5] Concerning this issue of claimant's preinjury average weekly wage, the ALJ determined:

> There are four (4) components to the compensation claimant received from respondent. The parties agree on three (3) of the components. Specifically, the parties agree that claimant earned $7.00 per hour when he performed maintenance on his vehicle or cleaned the public areas of hotels. The parties further agree the claimant was paid piecemeal for cleaning services in the individual hotel rooms. Finally, the parties agree that claimant's wages should include additional compensation in the amount of $50.00 paid for every 500 miles claimant traveled while working.
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> The parties disagree on the issue of whether additional compensation should also include the $20.00 to $25.00 day claimant received while "on the road." Claimant received $20.00 per day if he stayed at a hotel with kitchen accommodations and $25.00 if staying in a hotel room without a kitchen.
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> The Administrative Law Judge concludes that the travel reimbursement of $20.00 to $25.00 per diem constituted an economic benefit to claimant and should be included as additional compensation and computed as a component of claimant's average weekly wage. Accordingly, claimant's average weekly wage was $540.36 per week.[6]

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[2] See Supplemental Submission Letter on Behalf of Claimant at 4-7 (filed Jan. 18, 2006).

[3] Respondent's Letter to Board at 4-6 (filed May 9, 2006).

[4] See K.S.A. 44-511(a)(2)(c). See also *Leslie v. Reynolds*, 179 Kan. 422, 295 P.2d 1076 (1956); *Jordan v. Pyle, Inc.*, 33 Kan. App. 2d 258, 101 P.3d 239 (2004), *rev. denied* 279 Kan. __ (2005); *Ridgway v. Board of Ford County Comm'rs*, 12 Kan. App. 2d 441, 748 P.2d 891 (1987), *rev. denied* 242 Kan. 903 (1998).

[5] P.H. Trans. (Oct. 14, 2003) at 24.

[6] ALJ Award (Mar. 13, 2006) at 3-4.

The Board agrees with the ALJ's analysis and affirms her conclusion that claimant's gross preinjury wage was $540.36.[7] Because of this determination, there was no overpayment of temporary total disability compensation.

DaNey McLean, who worked for respondent in human resources, testified that in early 2005, she received medical restrictions for claimant from Dr. Gluck. Respondent decided to bring claimant back to work in the office until they received further clarification that he could go back on the road doing his former job. Claimant was to work a 40-hour full-time job running errands or working in the office. This was a job respondent created for claimant to accommodate his restrictions. When claimant returned on March 14, 2005, she gave him the job in the rock garden. A few minutes later, claimant came in and asked what he was going to be paid, and she told him he would be paid minimum wage. He then told her he was quitting. Ms. McLean said that the job in the rock garden was not something claimant would have worked on 40 hours a week. She expected he would work there a couple hours and would have gone on to another project. Claimant signed a document indicating that he was quitting after stating he would not work for minimum wage. Ms. McClean contends claimant never told her that the rock garden job was outside his restrictions, that he was not physically able to do the job, or that the job caused his hands to hurt. Ms. McLean testified that claimant was never told that respondent was unwilling to provide him work within his restrictions.

During her deposition testimony, Ms. McLean was shown a May 11, 2005, letter by respondent's attorney to Dr. Gluck which purported to confirm a conversation between the attorney and Dr. Gluck wherein the doctor had approved claimant's returning to his prior job duties with respondent. The letter was then signed by Dr. Gluck and dated May 23, 2005.[8] Ms. McLean stated that had claimant not quit on March 14, 2005, respondent would have returned him to his former position at his former rate of pay.

Dr. Gluck first saw claimant on September 18, 2003. Claimant complained of an eight-month history of bilateral upper extremity pain, greater on the right than on the left. Dr. Gluck examined the claimant and ordered tests. He also gave claimant restrictions of no repetitive grasping, pushing, or pulling with his bilateral upper extremities and no lifting over five pounds. On October 30, 2003, Dr. Gluck again saw claimant and went over his diagnostic tests. The EMG showed evidence of bilateral carpal tunnel syndrome and peripheral neuropathy. Claimant was given an injection for the right carpal tunnel. The injection provided a little relief for a couple of days and then claimant complained of a return of the throbbing discomfort, especially at night. Dr. Gluck sent him to physical therapy and gave him pain non-narcotic medication. By January 29, 2004, both Dr. Gluck

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[7] P.H. Trans. (Oct. 14, 2003), Cl. Ex. 1

[8] Gluck Depo., Ex. 3; McLean Depo., Ex. 3.

and claimant agreed on a surgical option. Dr. Gluck performed a right carpal tunnel release on February 9, 2004, and a left carpal tunnel release on March 29, 2004.

In June 2004, claimant complained that his thumb was locking, and Dr. Gluck diagnosed him with left trigger thumb. Dr. Gluck injected the left thumb, and claimant said the injection improved the popping and catching in his thumb. However, Dr. Gluck still found triggering to the thumb and tenderness over the A1 pulley to the left thumb and repeated the injection to the thumb. In August 2004, claimant began complaining of locking and triggering in his right thumb. A left trigger thumb release was performed on November 29, 2004, and a right trigger thumb release was performed on January 25, 2005. Dr. Gluck related claimant's trigger thumb to the repetitive activity performed while working at respondent. Dr. Gluck stated that incidents of trigger fingers are more common in patients with carpal tunnel.

By February 17, 2005, claimant was still having mild discomfort in his thumbs but no locking or triggering. He still complained of a deadness in his arms and says some days were better and some worse. Dr. Gluck considered him to be at maximum medical improvement and released him from treatment with permanent restrictions to "avoid repetitive grasping, pulling with bilateral hands to tolerance of pain, strength and endurance, no specific limitations."[9] Dr. Gluck explained that "no specific limitation" means claimant should adjust his activities according to what he is able to tolerate doing.

> PLAN: The patient is seen in the office by himself today. Overall, the patient states that he is pleased that he had the surgery performed. I think that I have done as much as I can do for him. I do not feel that there is any indication for any future medical care need. I think the treatment is primarily activity modification. I think it is reasonable for him to try to avoid doing repetitive activity. He has some concerns that this is going to limit his employability and especially financial gain. We will go ahead release him from care to follow-up on an as needed basis.
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> WORK STATUS: He is released with permanent restrictions to avoid repetitive grasping or pulling with both hands to tolerance of pain strengthen, and endurance. He does not need any specific restriction.[10]

It appears from Dr. Gluck's office notes that claimant was concerned about specific restrictions preventing him from returning to work and that this may be the reason that Dr. Gluck said he does not need specific restrictions. In regard to respondent's attorney's letter dated May 11, 2005, which Dr. Gluck signed on May 23, 2005, Dr. Gluck said he would not restrict claimant from performing any of his prior duties however, "that doesn't

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[9] Gluck Depo., Ex. 2 at 9, Ex. 4.

[10] Gluck Depo., Ex. 2 at 10.

necessarily mean that he can do those without having enough symptoms to prevent him from doing those."[11]

Dr. Gluck was asked to review a task list prepared by Karen Terrill but refused to comment on that report. He gave no opinion concerning what percentage of tasks claimant had lost the ability to perform.

Dr. Gluck did not anticipate that claimant would need any future medical treatment in regard to the injuries he received while working for respondent. He was aware that claimant filed a workers compensation claim against Sparkle Cleaning claiming an aggravation of his injuries. Dr. Gluck stated that claimant's work at Sparkle Cleaning exacerbated his injuries, but he felt that the exacerbation was temporary and would not result in a change in claimant's impairment rating.[12]

Dr. Gluck opined that claimant had a 4 percent impairment to the right upper extremity and a 4 percent impairment to the left upper extremity, which combined to a 4 percent whole person impairment, based on the AMA *Guides*.[13]

Claimant saw Dr. Pedro Murati, a board certified physiatrist, on April 18, 2005, at the request of his attorney. Although claimant reported to Dr. Murati that he started noticing problems with his hands in November 2002, during the regular hearing it was noted that claimant had been mistaken about when he started working for respondent but that he did not start having symptoms in his hands until after he started working for respondent. This time frame difference did not affect Dr. Murati's opinions.

Dr. Murati reviewed claimant's medical records and took a history of his medical treatment. He also did a physical examination of claimant and found decreased sensation in the upper extremities, mild crepitus and instability in the left wrist, and snapping at the flexor tendon on both sides. Using the AMA *Guides*, he opined that claimant had a 10 percent impairment to the right upper extremity and a 40 percent right thumb impairment, which converts to a 16 percent right hand impairment and a 14 percent right upper extremity impairment. He combined these ratings, making a 23 percent right upper extremity impairment which converts to a 14 percent whole person impairment. He also rated claimant with a 10 percent impairment to the left upper extremity and a 40 percent left thumb impairment, which converts to a 16 percent left hand impairment and a 14 percent left upper extremity impairment. He combined these ratings, making a 23 percent left upper extremity impairment which converts to a 14 percent whole person impairment.

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[11] Gluck Depo. at 13.

[12] See Gluck Depo., Ex. 5

[13] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Using the Combined Values Chart, the whole person impairments combined for a 26 percent whole person impairment.

Dr. Murati opined that claimant's symptoms were caused by his repetitive work at respondent. The Board finds that claimant suffered simultaneous injuries to his bilateral upper extremities while employed by respondent and, therefore, he is entitled to an award based upon a general body disability under K.S.A. 44-510e, not two separate scheduled injuries under K.S.A. 44-510d.[14]

Dr. Murati testified that claimant needed restrictions and recommended that claimant's restrictions include no crawling; no heavy grasping with the right or left hands; no lifting, carrying, pushing, or pulling over 75 pounds, 35 pounds occasionally, and 20 pounds frequently; no use of hooks or knives; and no use of vibratory tools.

Dr. Murati reviewed a task list prepared by Jerry Hardin and opined that of the 47 unduplicated items, claimant was unable to perform 25 for a task loss of 53 percent. He also reviewed the task list prepared by Karen Terrill and opined that of the 78 unduplicated tasks on the list, claimant was unable to perform 49 for a task loss of 63 percent.

Karen Terrill, a vocational rehabilitation consultant, met with claimant three times at the request of respondent's attorney. During these meetings, she compiled a list of all claimant's employers and job tasks he performed in the 15-year period before his work-related accident.

In analyzing claimant's wage earning capacity, Ms. Terrill referenced the restrictions of Dr. Murati. She opined that claimant would be able to perform the tasks involved as a delivery service truck driver, which would pay a median wage of $9.60 and a mean wage of $10.42 per hour, and a parking lot attendant, which would pay a median wage of $7.96 and a mean wage of $8.23 per hour. Accordingly, she believed that claimant could earn from $318.40 to $416.80 per week. She indicated that claimant indicated an interest in working at a car wash or as a companion for an elderly person. At a car wash, claimant could expect to earn from $7 to $8 per hour and as a companion he could earn from $6 to $8 per hour.

Claimant testified that the job respondent provided did not accommodate restrictions that he needed. However, claimant's medical restrictions were unclear. Moreover, it does not appear that this was the reason claimant quit. Rather, it appears that he quit primarily because he was upset when he learned that he was only going to be paid minimum wage.

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[14] *Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, 947 P.2d 1 (1997).

The Kansas appellate courts, beginning with *Foulk*[15], have barred a claimant from receiving work disability benefits if the claimant is capable of earning 90 percent or more of his or her preinjury wage at a job within his or her medical restrictions, but fails to do so, or actually or constructively refuses to do so. The rationale behind the decision is that such a policy prevents claimants from refusing work and thereby exploiting the workers compensation system. *Foulk* and its progeny are concerned with a claimant who is able to work but refuses to do so in order to take advantage of the workers compensation system. An employer is not required to make an offer of an accommodated job, but an employee's refusal to attempt an accommodated job that has been offered is evidence of a lack of good faith.[16] Before claimant can claim entitlement to work disability benefits, he must first establish that he made a good faith effort to obtain or retain appropriate employment.[17]

Respondent argues claimant's permanent partial general disability should be limited to his functional impairment rating as claimant voluntarily quit. The Board has held workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage. In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the current statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. On the other hand, employers must also demonstrate good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine,[18] where the accommodated job violates the worker's medical restrictions,[19] or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.[20]

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis. The claimant testified that he made a good faith attempt to perform the offered job but experienced the onset of pain as he attempted to

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[15] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[16] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[17] *See Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[18] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[19] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[20] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

perform the work activities. While the Board questions that this was claimant's reason for quitting, the job was not intended to be a permanent accommodation. Respondent intended to return claimant to his preinjury unaccommodated job. The medical evidence supports a finding that claimant could not have returned to that preinjury job. In addition, the office job that claimant was doing was temporary and it did not restore claimant to 90 percent of his preinjury average weekly wage. Accordingly, the Board finds that claimant is not precluded from receiving a work disability by virtue of his quitting the temporary, minimum wage job with respondent.

The Kansas Court of Appeals determined in *Gadberry*[21] that a worker who returned to work at her pre-injury wage but within a few weeks was terminated in a layoff was not precluded from receiving a work disability award. Moreover, the Court of Appeals noted that there was no evidence that the employer was accommodating the worker with a light-duty job.[22] The court stated, in part:

> Gadberry's return to work at the same wage that she had been receiving prior to her [January 21, 1994] injury does not preclude a finding of wage loss since she was given notice of her termination just a few weeks later, and the termination was based on an economic layoff. Pursuant to *Lee* [*v. Boeing Co.*, 21 Kan. App. 2d 365, 899 P.2d 516 (1995)], Gadberry became eligible for compensation on a work disability upon her termination, one component of which is wage loss. [23]

In addressing whether the principles in *Foulk* should preclude claimant from receiving a work disability, the court stated:

> Gadberry would have continued to work at Polk if she had not been terminated. The record reflects that Gadberry applied for retirement benefits subsequent to her termination because she needed health insurance. Even after she had applied for retirement benefits, Gadberry sought employment with numerous employers within the community. Gadberry did not refuse employment; it was never offered to her. [24]

Consequently, in *Gadberry* the Court of Appeals held that the worker was entitled to receive a work disability after she was terminated in an economic layoff despite returning to her regular work without accommodations.

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[21] *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

[22] *Id.* at 804.

[23] *Id.* at 805.

[24] *Id.* at 806.

In *Niesz,*[25] the Kansas Court of Appeals held that a worker was entitled to receive a work disability when the worker was later terminated for reasons that were unrelated to the work injury. In that decision, the Court of Appeals held that an accommodated job artificially circumvents a work disability, but once that accommodated job ends, the presumption of no work disability may be rebutted.

> Placing an injured worker in an accommodated job artificially avoids work disability by allowing the employee to retain the ability to perform work for a comparable wage. Once an accommodated job ends, the presumption of no work disability may be rebutted. [26]

> The presumption of no work disability is subject to reevaluation if a worker in an accommodated position subsequently becomes unemployed. [27]

Consequently, the Court of Appeals held that Ms. Niesz was entitled to receive a work disability after being fired, when the circumstances surrounding the termination did not demonstrate bad faith on the worker's part.

> The fact that Niesz' accommodated position ended does not mean that Niesz ceased having work restrictions. Niesz' work disability made it difficult for her to find work in the open market. The presumption of no work disability does not apply because Niesz is no longer earning 90 percent of her preinjury wages. See. K.S.A. 1998 Supp. 44-510e(a).[28]

Thereafter, in January 2003 the Kansas Court of Appeals, in *Cavender*[29], held that a worker who had obtained other employment following a work injury was entitled to receive work disability benefits after resigning her employment for reasons unrelated to the injury. The court reasoned that the proper test to apply in these situations is whether the worker acted in good faith to retain appropriate employment and when terminated, thereafter made a good faith effort to find appropriate employment. The court wrote, in part:

> K.S.A. 44-510e(a) allows work disability in excess of functional impairment only if the claimant is making less than 90% of his or her preinjury gross weekly

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[25] *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

[26] *Id.* at Syl. ¶ 2.

[27] *Id.* at Syl. ¶ 3.

[28] *Id*. at 740.

[29] *Cavender v. PIP Printing, Inc.*, 31 Kan. App.2d 127, 61 P.3d 101 (2003).

> wage. If this percentage is met, K.S.A. 44-510e(a) provides the equation for computing work disability[.]
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> . . . .
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> The cases interpreting K.S.A. 44-510e have added the requirement that an employee must set forth a good faith effort to secure appropriate employment before work disability will be awarded. [Citations omitted.]
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> The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis. . . .
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> The purpose of the good faith test, at its very core, is to prevent employees from taking advantage of the workers compensation system. [Citation omitted.] **In situations where post-injury workers leave future employment, the good faith test is extended to determine whether leaving was reasonable.** Clearly, in the cases cited by PIP [the employer], leaving employment was reasonable when the employment became outside physical restrictions or the changed circumstances justified a refusal of accommodated employment. **However, the reasonableness of leaving employment is not limited to a decision based on work restrictions or injuries.** (Emphasis added.)[30]

The Kansas Court of Appeals has consistently held that factors other than a worker's injury and permanent medical restrictions may be considered in determining whether a worker has acted in good faith to retain or to find employment.[31] Furthermore, in *Roskilly*[32], the Court of Appeals put to rest the argument that an injured worker who returns to the same unaccommodated job post injury is thereafter precluded from receiving a work disability should that job end.

In *Copeland*,[33] the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage

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[30] *Id.* at 129-32 .

[31] *See Ford v. Landoll Corp.*, 28 Kan. App. 2d 1, 11 P.3d 59, *rev. denied* 269 Kan. 932 (2000).

[32] *Roskilly v. Boeing*, 34 Kan. App. 2d 196, 116 P.3d 38 (2005).

[33] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

based on all the evidence before it. The Board finds claimant made a good faith job search post injury except for during the period of June 13, 2005, through September 8, 2005. Claimant said he made no job applications during this period because he did not have transportation. However, that is not an excuse for a complete lack of effort.[34]

Where claimant has demonstrated a lack of good faith in retaining post-injury employment, the post-injury wage for the permanent partial disability formula should be based on all the evidence, including expert testimony concerning the claimant's retained capacity to earn wages.[35] Accordingly, a post-accident wage of $280 per week ($7 per hour) will be imputed as claimant's post-accident wage earning ability for that three-month period.

Comparing a post-accident average weekly wage of $280 ($7 per hour x 40) to the preinjury average weekly wage of $540.36 results in a wage loss of 48 percent. For all other periods when claimant was not working, his wage loss was 100 percent. The only task loss opinion from a physician is that of Dr. Murati. Dr. Murati's task loss opinions are based upon the task lists prepared by Mr. Hardin and Ms. Terrill. Respondent correctly points out that the task lists prepared by Mr. Hardin and Ms. Terrill both omitted two jobs that claimant had performed during the relevant 15-year period before the accident. However, claimant's testimony, coupled with the task lists of the other jobs claimant performed, indicates that those two omitted jobs were essentially duplicative of tasks claimant performed in other jobs. Accordingly, the Board will not reject the task loss opinions based on their task lists.

Based upon the average of Dr. Murati's opinions using the task lists prepared by Mr. Hardin and Ms. Terrill, the Board finds claimant's task loss is 58 percent. When the wage and task loss percentages are averaged as required by the statute, claimant's work disability is 79 percent during the period claimant was not working and 53 percent for the period between June 13, 2005, and September 8, 2005, the period claimant was not looking for employment. Claimant's wage loss and thereby his work disability percentage would also change during those weeks where claimant was employed post injury with Sparkle Cleaning at an average weekly wage of $329.72 for a wage loss of 39 percent. Averaging the 39 percent wage loss and the 58 task loss results in a 48.5 percent work disability for the period claimant was working for Sparkle Cleaning. The record does not show how much claimant earned while working for the other cleaning service where he was employed in April 2005. However, since he only worked three to five hours a week, this did not constitute substantial gainful employment and will not be used to compute his wage loss for that period. Furthermore, under the accelerated pay out formula, it would not affect the amount of permanent partial disability compensation he would receive. That job, as

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[34] *Swickard v. Meadowbrook Manor*, 26 Kan. App. 2d 144, 976 P.2d 1256 (1999).

[35] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

well as the job with Sparkle Cleaning, was not of sufficient duration to constitute evidence of a higher wage earning capacity. To the contrary, the job with Sparkle Cleaning exceeded his physical capabilities.

Finally, as for whether claimant suffered an intervening injury while working at Sparkle Cleaning, claimant only worked at the Sparkle Cleaning job for two weeks, from approximately June 1, 2005, to June 12, 2005. Dr. Gluck said that job did not cause claimant any additional injury. There is no medical opinion to the contrary. Furthermore, this issue was neither briefed nor argued on appeal and, therefore, it is not clear whether respondent intended to pursue this issue before the Board. Nevertheless, an intervening injury was not proven.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated March 13, 2006, is modified to show that the claimant is entitled to temporary total disability from June 23, 2003, through February 7, 2005, followed by a 79 percent work disability from February 8, 2005, through May 31, 2005. For the period of June 1, 2005, through June 12, 2005, claimant is entitled to a 48.5 percent work disability. For the period of June 13, 2005, through September 7, 2005, claimant is entitled to a 53 percent work disability. Thereafter, claimant is entitled to a 79 percent work disability.

The claimant is entitled to 86.57 weeks of temporary total disability compensation at the rate of $360.26 per week or $31,187.71, followed by 16 weeks of permanent partial disability compensation at the rate of $360.26 per week or $5,764.16 for a 79 percent work disability, followed by 1.71 weeks of permanent partial disability compensation at the rate of $360.26 per week or $616.04 for a 48.50 percent work disability, followed by 12.43 weeks of permanent partial disability compensation at the rate of $360.26 per week or $4,478.03 for a 53 percent work disability, followed by permanent partial disability compensation at the rate of $360.26 per week not to exceed $100,000 for a 79 percent work disability.

As of August 4, 2006 there would be due and owing to the claimant 86.57 weeks of temporary total disability compensation at the rate of $360.26 per week in the sum of $31,187.71 plus 75.99 weeks of permanent partial disability compensation at the rate of $360.26 per week in the sum of $27,376.16 for a total due and owing of $58,563.87, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $41,436.13 shall be paid at the rate of $360.26 per week until fully paid or until further order from the Director.

The Board adopts the other orders of the ALJ to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of August, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier